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Recent Decisions

RECENT DECISIONS

CIVIL PROCEDURE—Manufactured Diversity—The appointment of an administrator c.t.a. of an estate for the purpose of obtaining federal diversity jurisdiction is "improper" or "collusive" within the meaning of section 1359 of the Federal Rules of Civil Procedure. *O'Brien v. AVCO Corp.* (2d Cir. 1969).

In 1965, all passengers of a small airplane owned by the Paul G. Badgley Company of New York were killed when the plane crashed en route to Cleveland, Ohio. Two years later, Mrs. Barch, the wife of one of the deceased passengers, in her capacity as executrix of her husband's estate, instituted a wrongful death action in the New York County Supreme Court against the Badgley Company, the AVCO Corporation (which maintained the plane), and the Bendix Corporation (which made the allegedly faulty component). Later in the same month, Mrs. Badgley, the wife of the deceased pilot, and the Badgley Company filed suit against AVCO, Bendix, and Mooney Aircraft, Inc. (the maker of the plane), as did the estates of the other deceased passengers.

The Badgley Company then moved to have all the actions tried jointly in the Onondaga County Supreme Court. Fearful of prejudice from a state court, the Barch attorneys decided to remove the case to a federal court. The Surrogate Court of Onondaga County allowed Mrs. Barch to resign as administratrix and appointed O'Brien, a New Jersey resident, as administrator c.t.a. so that federal diversity jurisdiction could be obtained. O'Brien thus subsequently brought suit in the United States District Court for the Southern District of New York on the grounds of diversity of citizenship. Before the case was heard on the merits, an interlocutory appeal was granted by the United States Court of Appeals for the Second Circuit; the court *held* that the appointment of an administrator c.t.a. of an estate for the purpose of obtaining federal diversity jurisdiction is "improper" or "collusive" within the meaning of section 1359 of the Federal Rules of Civil Procedure. *O'Brien v. AVCO Corp.*, 425 F.2d 1030 (2d Cir. 1969).

In its opinion the Second Circuit court stated that:

> [T]he sole question for determination on appeal is whether appointment of an administrator c.t.a. of an estate for the purpose of invoking federal diversity

jurisdiction is "improper" or "collusive" within the meaning of 28 U.S.C. § 1359 (1964).[1]

The defendant's basic contention was that the appointment of O'Brien as administrator c.t.a. for the sole purpose of invoking federal diversity jurisdiction violated section 1359 of the Federal Rules of Civil Procedure which was designed to prevent "manufactured diversity."[2] O'Brien contended, however, that his appointment was not a violation of section 1359 and based his argument on *Lang v. Elm City Construction Co.*[3] In this case the court permitted manufactured diversity where the appointee was a fiduciary, such as an administrator. The value of the *Lang* case as precedent was however, doubtful because *Lang* was a *per curiam* opinion with the only reasoning being a citation to *Corabi v. Auto Racing, Inc.*,[4] a Third Circuit case. Thus, the *Corabi* decision was of crucial importance to the *O'Brien* court.

The *Corabi* decision was based on *Black & White Taxi-Cab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*[5] where the court held that, if there was an actual transfer, an assignment would not be collusive regardless of motive. This case received universal condemnation as a flagrant abuse of diversity jurisdiction, and its continuing validity is doubtful.[6] Of greater importance to the *O'Brien* court was the fact that *Corabi*, on

1. O'Brien v. AVCO Corp., 425 F.2d 1030, 1031 (2d Cir. 1969). 28 U.S.C. § 1359 refers to the Federal Rules of Civil Procedure.

2. 28 U.S.C. § 1359 (1964) states that "[a] district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court."

3. 324 F.2d 235 (2d Cir. 1963).

4. 264 F.2d 784 (3d Cir. 1959). In this case a Pennsylvania minor was killed at a car race. The deceased's mother was administratrix but was allowed to resign expressly for the purpose of enabling the court to appoint a non-resident as administrator to create federal diversity jurisdiction. The Third Circuit held that the appointment of a non-resident administrator for the sole purpose of creating federal jurisdiction was not "collusive" or "improper" within the meaning of section 1359. *Id.* at 788.

5. 276 U.S. 518 (1928). In this case, a Kentucky corporation transferred its corporate interest to a Tennessee corporation so that a federal action could be brought to enjoin two Kentucky corporations from interference with contract rights.

6. C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 31, at 86 n.17 (1963). Not only was *Black & White Taxicab* a weakpoint of *Corabi*, but *Corabi* also suggested that the dictionary interpretation of "collusive" illustrated that section 1359 prohibited only secret agreements. The *O'Brien* court stated that the purpose of § 1359 "[w]as to prevent arguments whose primary aim was to vest the court with a jurisdiction it had not formerly enjoyed." 425 F.2d 1030, 1034 (2d Cir. 1969).

which *Lang* rested, had been expressly overruled by the Third Circuit in *McSparran v. Weist.*[7]

In *McSparran* the court held that a third party appointed as administrator solely for the purpose of creating diversity jurisdiction is improperly or collusively named if he has no real or substantial interest in the dispute. The *McSparran* court limited its decision to disallowance of diversity jurisdiction where the appointed fiduciary was a straw party based on a naked arrangement aimed solely at creating diversity jurisdiction.[8] The court felt that the desire to achieve diversity was not in itself improper and that usually the motives behind appointment of a fiduciary should not be considered. However, where diversity jurisdiction depends on the citizenship of a fiduciary whose citizenship is different from that of his beneficiary, motive should be examined in order to determine if the fiduciary is a straw party. The burden of proof is on the party asserting diversity jurisdiction to prove that the fiduciary is not a mere straw party. If the burden is not carried, the representative is not treated as a true fiduciary, and the citizenship of the beneficiary is determinative.

The most recent Supreme Court pronouncement on section 1359 was in *Kramer v. Carribean Mills, Inc.*[9] The Court held that an assignment for the purpose of creating federal jurisdiction violative section 1359 if the assignor retained a substantial interest in the outcome of the case.[10] In discussing *Kramer*, the court was unable to find any significant reason for distinguishing the appointment of the administrator in the instant case and the assignment involved in that case. The court, therefore, regarded the opinion in *Kramer* as impliedly overruling the grounds on which their *Lang* decision was based.[11] The Second Circuit also felt that the Third Circuit's explicit overruling of *Corabi*, on which *Lang* rested, further invalidated their *Lang* decision. Thus, the court

7. 402 F.2d 867 (3d Cir. 1968). The pertinent facts of this case are identical in nature to the facts of *Corabi*. A straw party was chosen as guardian of an injured minor solely for the purpose of creating diversity jurisdiction.

8. The *McSparran* court distinguished *Black & White Taxicab* on its facts. In *Black & White Taxicab* the new corporation, which was created to establish diversity jurisdiction, was not a mere "straw"—the transaction was real and had importance beyond creating federal diversity jurisdiction.

9. 394 U.S. 823 (1969). A Panamanian corporation assigned its entire interest in a contract with a Haitian corporation to a Texas attorney so that an action could be brought in a United States federal court on grounds of diversity of citizenship jurisdiction. The Texas attorney promised to pay the Panamanian Corporation 95% of any net recovery on the assigned cause of action.

10. The Supreme Court expressly reserved its opinion on the question of fiduciaries appointed to confer diversity jurisdiction.

11. 425 F.2d at 1036.

no longer considered *Lang* as binding and held that the appointment of an administrator c.t.a. for the purpose of obtaining federal diversity jurisdiction violated section 1359. In dismissing the action from federal court, Judge Kaufman stated that:

> Plaintiffs have a viable action pending in the state courts, and will suffer no hardship other than loss of the federal forum they did not deserve.[12]

The present trend in federal diversity actions is toward abolishing manufactured diversity as a vehicle to achieve federal jurisdiction, but the issue has not been firmly decided in some circuits.[13] In the Fourth Circuit, the issue appears to be settled that the appointment of a non-resident fiduciary for the sole purpose of creating federal diversity jurisdiction is violative of section 1359.[14] However, since the issue of manufactured diversity is still unsettled in some circuits, a United States Supreme Court decision would be helpful in clarifying the law in this area of federal jurisdiction. When, and if, the Supreme Court hears such a case, the affirmation of cases such as *O'Brien* and *McSparran* will be welcomed by an overburdened federal system.

WALLACE G. HOLLAND

12. *Id.* at 1036.
13. *See* McSparran v. Weist, 402 F.2d 867 (3d Cir. 1968); Lester v. McFadden, 415 F.2d 1101 (4th Cir. 1969).
14. Lester v. McFadden, 415 F.2d 1101 (4th Cir. 1969). *See also* Arant v. Stover, 307 F. Supp. 144 (S.C. 1969) in which Judge Hemphill stated that "[t]he Fourth Circuit now frowns on the forum shopping practiced by invoking federal jurisdiction through artificial or collusive means." *Id.* at 151.

CIVIL RIGHTS—Private College Discipline and Due Process Afforded to Students—Jurisdiction of federal district court over class action brought by students alleging violation of first, fifth, and fourteenth amendment rights by a private college disciplinary board is dependent on there being state action. *Counts v. Voorhees College* (D.S.C. 1970).

The plaintiffs sought to invoke federal jurisdiction upon federal constitutional grounds in order to obtain a reversal of disciplinary expulsions and suspensions of several students. The disciplinary actions followed a student boycott of classes protesting the failure of the college to rehire four faculty members. College administrators had reacted to the boycott by closing the college and obtaining a state court restraining order prohibiting students and faculty from remaining on the campus. The defendants subsequently charged one hundred sixty-three students with violations of specific college regulations during the boycott. These students were notified of the charges against them, of the time and place of disciplinary hearings, and that they would have an opportunity to be heard. Students who appeared at the hearings were advised of their rights to representation, to present their own witnesses, to question witnesses presented against them by the college at the hearing, and that continuances would be granted if desired. After the hearings each student was notified of the disciplinary action taken against him and of his right to appeal. Appeals to Voorhees College appellate committees by some of the twenty students dismissed or suspended were still pending when the plaintiffs filed suit in the federal district court.

The court, after a full hearing, held that injunctive relief could not be granted because the plaintiffs had failed to establish federal jurisdiction to enjoin the college disciplinary proceedings, and that, even if jurisdiction had existed, there was no basis on the merits of the case to grant such relief. Pursuant to these findings the court dismissed the complaint. *Counts v. Voorhees College*, 312 F. Supp. 598 (D.S.C. 1970).

Courts traditionally have been reluctant to interfere with college and university disciplinary procedures.[1] One reason has been that section one prohibitions of the fourteenth amendment are directed primarily at state action[2]; therefore, acts of private

1. *See, e.g.*, John B. Stetson Univ. v. Hunt, 88 Fla. 510, 102 So. 637 (1924); Gott v. Berea College, 156 Ky. 376, 161 S.W. 204 (Ky. App. 1913); Anthony v. Syracuse Univ., 224 App. Div. 487, 231 N.Y.S. 435 (4th Dep't 1928).
2. U.S. CONST. amend. XIV, § 1 provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law...."

individuals and institutions have generally fallen outside the proscriptive sphere of the amendment.[3] In the past decade, however, many courts have relied on the state action doctrine[4] and recognized tax supported *public* universities as instrumentalities of the state, thereby extending fourteenth amendment due process protections to dismissed or suspended students.[5] But *private* university disciplinary procedures are still largely immune from judicial review; the constitutionally required rights to due process, defined by the court in *Dixon v. Alabama State Board of Education*,[6] have not yet been extended to private university students.[7]

The court in *Counts* dealt with two principle issues: that of jurisdiction and that of whether the affected students had been afforded constitutionally required rights to due process throughout the disciplinary proceedings. Although the question of jurisdiction controlled whether the relief sought could be granted, the court determined that it was necessary to dispose of the matter on the merits.[8] Otherwise, any relief that the court could have granted to reinstate the expelled and suspended students would have been of little practical value if such relief were appreciably delayed.[9] The court therefore heard the case on the merits and reserved its ruling on the question of the court's jurisdiction until all the evidence was fully developed by the parties.

3. *See* Civil Rights Cases, 109 U.S. 3, 10-11 (1883), where the Court said: "It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the [fourteenth] amendment." *See also* 16 AM. JUR. 2d *Constitutional Law* § 475 (1964).

4. The state action doctrine invokes fourteenth amendment proscriptions essentially by equating formally private conduct with state conduct by finding in the private conduct some state control, the performance of a state or public function, or the existence of several state contacts. *See, e.g.*, Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968); Evans v. Newton, 382 U.S. 296 (1966); Burton v. Wilmington Parking Auth. 365 U.S. 715 (1961); Pennsylvania v. Board of Directors of City Trusts, 353 U.S. 230 (1957); Terry v. Adams, 345 U.S. 461 (1953); Marsh v. Alabama, 326 U.S. 501 (1946).

5. *See* Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961), *cert. denied*, 368 U. S. 930 (1961) (holding that in a disciplinary action a student at a tax supported institution is entitled to notice that he is charged with misconduct, a statement of and justification of the charges, a list of names of witnesses against him and their proposed testimony, an opportunity to present his defense, and an opportunity to inspect the report of the findings of the disciplinary body); Esteban v. Central Mo. State College, 290 F. Supp. 622 (W.D. Mo. 1968); Hammond v. South Carolina State College, 272 F. Supp. 947 (D.S.C. 1967). *See also* Barker v. Hardway, 283 F. Supp. 228 (S.D.W. Va. 1968), *aff'd* 399 F.2d 638 (4th Cir. 1968), *cert. denied*, 394 U.S. 905 (1969).

6. 294 F.2d 150 (5th Cir. 1961).

7. *See, e.g.*, Browns v. Mitchell, 409 F.2d 593 (10th Cir. 1969); Powe v. Miles, 407 F.2d 73 (2d Cir. 1968); Grossner v. Trustees of Columbia Univ., 287 F. Supp. 535 (S.D.N.Y. 1968).

8. Counts v. Voorhees College, 312 F. Supp. 598, 604 (D.S.C. 1970).

9. *Id.*

In its evaluation of the evidence, the court proceeded on the premise that, if Voorhees *were* a state supported college, the disciplined students would thereby be entitled to protection of their first, fifth, and fourteenth amendment rights. The plaintiffs' contentions that the closing of the college and the disciplinary actions were designed to put a chilling effect on the plaintiffs' first amendment rights to free speech and assembly were refuted by the court on evidence that "the decision to close the college was prompted and motivated by a proper desire to protect its students, faculty . . . and . . . property from riot and destruction . . . ."[10] The court found, moreover, that the notices funished to the students contained as much information as is generally contained in a criminal indictment and therefore met the requirements of federal due process.[11] No federal question is involved when a college fails to advise a student, in a notice of charges, of student "rights" *granted by the college* and prescribed in a student handbook or other college publication.[12] Thus, although the notices of the charges and hearings given by Voorhees to the students did not specifically advise them of their right to counsel and to have witnesses available (this *was* done orally at the hearings) as required by the student handbook, no federal due process right was denied and no jurisdiction was bestowed upon the court under such circumstances.[13] Finally, the Voorhees disciplinary procedures were fully sufficient to meet the requirements of due process defined in *Dixon*[14] for imposition on state supported institutions.[15] On these findings the court concluded that the constitutional rights of the complainants had been fully

10. *Id.* at 605.
11. *Id.* One reason given for the disciplinary process of a college not being equivalent to state or federal criminal law process is that, while an expelled student may suffer damaging effects to his educational, social, or economic future, he may not be imprisoned, fined, disenfranchised, or subject to probationary supervision. Esteban v. Central Mo. State College, 290 F. Supp. 622, 628 (W.D. Mo. 1968).
12. Stricklin v. Regents of Univ. of Wis., 297 F. Supp. 416, 421 (W.D. Wis. 1969) (where the court, regarding the situation of the university regents' withholding from the plaintiffs a "right" conferred by the regents in their own by-laws, said: "Whether the Regents have honored their own By-Laws is not a federal question. Nor is it a question with constitutional overtones, except to the extent that a procedure required by a by-law coincides with a procedure required by the Constitution of the United States.")
13. 312 F. Supp. at 606. It should be noted that, even if a federal question had been involved, jurisdiction would have vested in the federal district court only if Voorhees were a public college or the court found state action.
14. The requirements are listed in note 5 *supra*.
15. 312 F. Supp. at 605.

protected by the procedures and actions taken by the defendant private college.[16]

From the wording of the complaint the court assumed that the plaintiffs sought to invoke federal jurisdiction pursuant to Title 42, Section 1983 and Title 28, Section 1343(3) of the United States Code.[17] Section 1983[18] creates a substantive right against any person who acts, *inter alia*, under color of state law to violate college students' constitutional rights through disciplinary action.[19] Section 1343(3)[20] creates a procedural right by granting original jurisdiction to federal district courts for enforcement of section 1983. These substantive and procedural rights are limited in application to complaints which allege deprivation of constitutional rights under color of state law.[21] Therefore, since state action, not federal action, is the concern of section 1983, jurisdiction of the federal district court could not be invoked merely upon the plaintiffs' proof that the college received federal financial assistance for construction, scholarships, and student aid.[22]

The court in *Counts* was faced with the question of what constitutes "state action" as contemplated by sections 1983[23] and 1343(3).[24] In their complaint the plaintiffs did not allege any obvious financial or regulatory state involvement in the Voorhees disciplinary procedures. The evidence revealed that Voorhees College was a private, sectarian, liberal arts college supported by the Episcopal Church, tuitions, and student fees. It received no state financial assistance.[25] In their complaint the plaintiffs as-

16. *Id.*
17. *Id.* at 606.
18. 42 U.S.C. § 1983 (1871) provides:
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
19. 312 F. Supp. at 606.
20. 28 U.S.C. § 1343(3) (1964) provides:
The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
....
(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.
21. 312 F. Supp. at 607.
22. *Id.* at 606.
23. 42 U.S.C. § 1983 (1871).
24. 28 U.S.C. § 1343(3) (1964).
25. 312 F. Supp. at 601.

serted that the alleged abridgements of their first, fifth, and fourteenth amendment rights were effected by two individual defendants, the Chairman of the Board of Trustees and the Acting President of Voorhees College, and the defendant college.[26] These facts failed to disclose any obvious state involvement with the defendants' actions upon which the court could support a finding of state action and establish jurisdiction. However, the plaintiffs did allege that Voorhees College served a "public function" in the field of education and that operation of the college involved non-obvious state participation and was, in effect, state action.[27] The court, therefore, sought to determine from the evidence if there was a sufficient accumulation of various indicia of state involvement to support a finding of state action.[28]

The "public function" doctrine was also asserted in *Powe v. Miles*,[29] but the court pointed out that a college campus is not public property[30] and that education is not an exclusively governmental function.[31] Even where, as in *Powe*, there were numerous administrative, financial, and regulatory contacts between the university and the state, there must be the additional element of direct state participation in the activity that caused the complaint to reach a finding of state action.[32] That is, the state action, not the private action, must be the subject of the complaint.[33]

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26. *Id.* at 606.
27. *Id.* at 600. The plaintiffs' contention was that the defendants' operation as a private institution so effected a public interest or its intricate involvement with governmental functions were such that it could not escape the prohibitions of the first, fifth, and fourteenth amendments to the federal constitution, and that operation of the college was, in effect, state action.
28. This is, in essence, the test for non-obvious state involvement stated in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961). For a discussion of types of conduct that might constitute non-obvious involvement of the state, *see Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045, 1056-64 (1968).
29. 407 F.2d 73 (2d Cir. 1968). In this case Alfred University, a private university, operated on its campus the New York State College of Ceramics under contract with the State of New York. Administration of the ceramics college involved numerous administrative, financial, and regulatory contacts between Alfred and the state. Four liberal arts students from Alfred and three ceramic college students were suspended following student demonstrations. The court held that regulation of demonstrations and the discipline of students at the ceramics college by the president and dean of students at Alfred constituted state action and the three students affected thereby should have been afforded federal constitutional rights. The other four students, by virtue of their attendance at the "private" portion of Alfred, were not accorded the same rights. *Id.*
30. *Id.* at 80.
31. *Id.*
32. *Id.* at 81.
33. *Id.*

In *Browns v. Mitchell*[34] the court held that a private university which received no state funds but enjoyed a tax exemption of approximately $210,000 not enjoyed by other like corporations did not constitute state action within the meaning of section 1983.[35] The court stated: "[T]he due process provisions of the fourteenth amendment proscribe state action only and do not reach acts of private persons unless they are acting 'under color of state law.' "[36]

In *Grossner v. Trustees of Columbia University*[37] the court denied the students' motion for injunctive relief asserted under section 1983,[38] on the grounds that, while education is considered in the public interest, education as such did not constitute "state action" subject to federal constitutional requirements.[39]

Powe, *Browns*, and *Grossner* are all readily distinguishable from *Counts* in that the evidence in each case (except *Counts*) disclosed indicia of state involvement, although the indicia were insufficient for the respective courts to support a finding of state action. The court in *Counts* concluded:

> [T]here is no showing that the state created or regulates Voorhees College in any manner. . . . It contributes nothing to its support, and it is not . . . involved in the disciplinary action complained of. Its campus is not public property nor is its function that of government. There being no state action, it follows that there is no federal jurisdiction of the matters here complained of.[40]

The denial of federal court jurisdiction in *Counts* was predictable and consistent with other recent federal court decisions. Although a full evidentiary hearing was required to develop fully the existence or nonexistence of state action, the case could have been disposed of solely on the question of jurisdiction. Instead, the court took the opportunity to examine the rights afforded the students during the disciplinary proceedings closely. Analysis of

34. 409 F.2d 593 (10th Cir. 1969). In this case, action was brought for injunctive relief in the nature of reinstatement by students who had been suspended for sit-ins in a non-public area of a building at the private University of Colorado.
35. 42 U.S.C. § 1983 (1871).
36. Browns v. Mitchell, 409 F.2d 593, 594 (10th Cir. 1969).
37. 287 F. Supp. 535 (S.D.N.Y. 1968). The action in this case sought injunctive relief against pending disciplinary proceedings resulting from student participation, *inter alia*, in seizing campus buildings.
38. 42 U.S.C. § 1983 (1871).
39. Grossner v. Trustees of Columbia Univ., 287 F. Supp. 535, 549 (S.D.N.Y. 1968).
40. 312 F. Supp. at 607.

several of the authorities cited by the court in *Counts* reveals anomalous situations in which students are afforded substantially different rights for substantially similar conduct merely by reason of their attendance at a "private" as opposed to a "public" college or university. The same indicia of state involvement that, until now, have been held insufficient to support a finding of state action at a private college may, in the future, be construed to support such a finding. The court in *Counts* followed the traditional guidelines used by most courts in determining the existence of jurisdiction to review college disciplinary proceedings. However, it may well have ruled differently on the question of jurisdiction had the merits revealed, contrary to the facts here, that the affected students had been denied their constitutionally required rights to due process.

WILLIAM J. DEAN

INTERSTATE COMMERCE—"Primary Business Test"—A private warehouse company, which did not do business with the general public, and which transported about five percent of the supplies stored by it outside the state without a certificate of necessity and convenience was a "contract carrier" and violated the Interstate Commerce Act. *I.C.C. v. V. S. C. Wholesale-Warehouse Co.* (D. Idaho 1969).

The defendant, V.S.C. Wholesale-Warehouse Co.,[1] is an Idaho corporation engaged in the business of warehousing and distributing mobile home and travel trailer materials and furnishings for approximately forty producers located throughout the United States. Ninety-five percent of the merchandise warehoused was moved from the various producers to the warehouse facilities by common carrier, with the balance being transported for compensation from California producers to Idaho by trucks leased and controlled by V.S.C. It is this latter five percent that is at issue in this case.

Title to all the merchandise handled by V.S.C. remains in the producer at all times, regardless of the means by which it is transported, with V.S.C. acting only as an agent for the producers. V.S.C. charges the producers from two to three percent of the dollar volume for the transportation, and the revenue received therefrom is accounted for separately from its warehouse revenues. V.S.C. contended that it must perform this transportation in order to maintain a sufficient inventory of short supply items and to meet emergency demands. The facts further demonstrated that agricultural commodities, which are exempt from the Interstate Commerce Act, were solicited for and transported from Idaho to California and such revenue was commingled with the other transportation revenue. The district court concluded that V.S.C.'s transportation services were outside the scope of its warehousing business. Therefore, the court held that V.S.C. was in violation of the Interstate Commerce Act and should be enjoined from continuing such interstate transportation without proper authority from the Interstate Commerce Commission. *I.C.C. v. V.S.C. Wholesale-Warehouse Co.*, 312 F. Supp. 542 (D. Idaho 1969).

The United States Constitution gives Congress the power to regulate commerce among the states.[2] Pursuant to this power

1. Hereinafter referred to as V.S.C.
2. U.S. CONST. art. I, § 8.

Congress enacted the Interstate Commerce Act, certain provisions of which V.S.C. was charged with violating.[3] It has been held that definitions set forth in this Act should be read together and construed liberally in order to fulfill the purpose of the Act, which is to end for-hire transportation under the guise of private carriage.[4]

As an aid to interpreting the definition of a private carrier[5] and to differentiate between pseudo-private carriage and transportation that is actually in furtherance of a non-carrier business, the Interstate Commerce Commission developed the "primary business test." This test was first enunciated by the Commission in *Lenoir Chair Co., Contract Carrier Application:*

> If the facts establish that the primary business of an operator is the supplying of transportation for compensation then the carrier's status is established though the operator may be the owner, at the time, of the goods transported and may be transporting them for the purpose of sale. . . .
>
> If, on the other hand, the primary business of the operator is found to be manufacturing or some other non-carrier commercial enterprise, then it must be determined whether the motor operations are in bona fide furtherance of the primary business or whether they are conducted as a related or secondary enterprise with the

3. INTERSTATE COMMERCE ACT § 203(C), 49 U.S.C. § 303(C) (1964). The provision that V.S.C. allegedly violated states:

> [N]o person shall engage in any for-hire transportation business by motor vehicle, in interstate or foreign commerce, on any public highway or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such person a certificate or a permit issued by the Commission authorizing such transportation, nor shall any person engaged in any other business enterprise transport property by motor vehicle in interstate or foreign commerce for business purposes *unless* such transportation is within the scope, and in the furtherance of a primary business enterprise (other than transportation) of such person.

(Emphasis added); *see also* § 206(a), 49 U.S.C. § 306 (a) (requiring a certificate of public convenience and necessity for operation as a common carrier); § 209(a), 49 U.S.C. § 309(a) (requiring a permit for operation as a contract carrier).

4. A. W. Stickle & Co. v. I.C.C., 128 F.2d 155 (10th Cir. 1942), *cert. denied,* 317 U.S. 650 (1942).

5. INTERSTATE COMMERCE ACT § 203(a) (17), 49 U.S.C. § 303(a) (17) (1964) defines a private carrier as:

> [A]ny person not included in the terms "common carrier by motor vehicle" or "contract carrier by motor vehicle," who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise.

purpose of profiting from the transportation performed. In our opinion, they cannot be both.[6]

The Commission's test was upheld by the courts in *Brooks Transportation Co. v. United States*[7] and *Red Ball Motor Freight, Inc. v. Shannon*[8] as well as being subsequently codified in 1958 by amendment to section 203(C) of the Interstate Commerce Act. This amendment specifically provided that the transportation must, first, be within the scope and, second, in furtherance of a primary business enterprise other than transportation. Both aspects of this test must be satisfied if the transportation is to be private carriage.[9]

Using this test, the *V.S.C.* court concluded that the transportation furnished by V.S.C. was clearly *in furtherance of* its non-transportation business of warehousing. However, the court would *not* accept transportation of this magnitude[10] as being *within the scope of* V.S.C.'s warehousing business: "The transportation activities now before the court go beyond that degree of carriage which might reasonably be deemed to be within the scope of a usual warehousing establishment."[11] The main point that brought the court to this conclusion was the fact that V.S.C. served only California producers with transportation. This tended to point out that V.S.C.'s transportation service was not actually in bona fide furtherance of warehousing, but was supplementary to hauling the exempt agricultural products to California, thereby creating a separate enterprise. In addition, V.S.C. did not show why the five percent transported by it could not be delivered by common carrier as efficiently as the other ninety-five percent. Of paramount importance was the court's reasoning that, if they held this transportation to be private carriage, nothing would preclude V.S.C. from expanding this operation into even greater magnitude.[12] For these reasons the court found that V.S.C. failed to qualify as a private carrier under section 203(a) (17) of the Interstate Commerce Act.

6. Red Ball Motor Freight, Inc. v. Shannon, 377 U.S. 315 (1964), *quoting from* 51 M.C.C. 75 (1949).
7. 93 F. Supp. 517 (E.D. Va. 1950), *aff'd per curiam*, 340 U.S. 925 (1950).
8. 377 U.S. 311 (1964).
9. Church Point Wholesale Beverage Co. v. United States, 200 F. Supp. 508 (W.D. La. 1961).
10. V.S.C.'s books showed receipts of $22,394.
11. 312 F. Supp. at 547.
12. *Id.*

Since V.S.C. did not hold its services out to the general public, it clearly was not a "common carrier."[13] However, V.S.C. did fulfill the requirements for a "contract carrier,"[14] in that it provided transportation designed to meet the distinct need of each individual customer under contract. The assessment of charges by the carrier and payment thereof by the producers were sufficient evidence to support the court's finding of the existence of a contract.[15]

V.S.C. contended, however, that it could not be a contract carrier under the Act, because it performed the transportation services without profit. This claim has been refuted in previous cases which hold that reimbursement for expenses of operation meets the requirement that there be compensation.[16] In any event, in *Studna v. United States* [17] the court stated that the history of the Act shows that the proper criterion is the "primary business test" and not the compensation factor cited by V.S.C. Therefore, the court concluded:

> The provisions of the Interstate Commerce Act relating to motor vehicles are sufficiently broad and comprehensive to include within its scope all those who, regardless of the procedure or manner of operation involved, are in substance engaged in transporting property in interstate commerce for hire.[18]

Thus, the court held that V.S.C. was in violation of the Inter-

13. INTERSTATE COMMERCE ACT § 203(a) (14), 49 U.S.C. § 303(a) (14) (1964) provides:
> [A]ny person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes....

14. *Id.* at § 203(a) (15), 49 U.S.C. at § 303(a) (15) provides:
> [A]ny person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) of this subsection and the exception therein) under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served, or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer.

15. 312 F. Supp. at 548.

16. Shippers Cooperative, Inc. v. I.C.C., 308 F.2d 888 (9th Cir. 1962); Schenley Distillers Corp. v. United States, 61 F. Supp. 981 (D. Del. 1945), *aff'd,* 326 U.S. 432 (1946).

17. 225 F. Supp. 973 (W.D. Mo. 1964).

18. 312 F. Supp. at 548; I.C.C. v. Teeter, 228 F. Supp. 479 (N.D. Ga. 1964); B & C Truck Leasing, Inc. v. I.C.C., 283 F.2d 163 (10th Cir. 1960).

state Commerce Act and should be enjoined from continuing such interstate transportation without proper authority.[19]

This case exemplifies the trend of the courts in recent years to support the Commission in its attempts to protect its authorized interstate transporters by restricting the scope of private carriage, as authorized by the 1958 amendment.[20] The courts will, undoubtedly, continue this trend in the future by interpreting the Interstate Commerce Act liberally in order to hault for-hire interstate transportation under the guise of private carriage.

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19. 312 F. Supp. at 548-49.
20. Church Point Wholesale Beverage Co. v. United States, 200 F. Supp. 508 (W.D. La. 1961). *See also* note 16, *supra*.

UNIFORM COMMERCIAL CODE—ARTICLE NINE—Haybine being used by non-farmer is "farm equipment" for which a financing statement need not be filed in order to perfect a purchase money security interest under Section 9-302(1)(c) of the Uniform Commercial Code. *Citizens Nat'l Bank v. Sperry-Rand Corp.* (Tex. Civ. App. 1970).

Reynolds, the owner and operator of a retail feed and grain store, purchased a haybine[1] for use in a commercial hay cutting and baling business which he operated in connection with his store. The purchase price of the machine was $2,280, of which $780 was paid in cash. To cover the balance, the seller reserved a purchase money security interest in the haybine. He later assigned this interest to the appellee, Sperry-Rand Corporation. No financing statement was filed either by the seller or by the appellee. Seven months later, while still indebted to appellee, Reynolds, having obtained a loan, executed a security agreement in favor of the appellant bank in which the same haybine was designated as collateral. The bank promptly filed a financing statement with the Secretary of State.[2] Subsequently, Reynolds defaulted on the loan, and the bank foreclosed and sold the haybine.

Sperry-Rand, assignee of the first security interest, instituted an action for conversion, and the lower court rendered summary judgment against the defendant bank. On appeal the court affirmed and *held*, that the haybine was "farm equipment" under Section 9.302(a)(3) of the Texas Business and Commerce Code and the security interest in it was thus perfected without being filed. The result being that Sperry-Rand's perfected but unfiled security interest had priority over the filed security interest of appellant bank under Section 9.312 of the Texas Business and Commerce Code. *Citizens Nat'l Bank v. Sperry-Rand Corp.* (Tex. Civ. App. 1970).

1. "Haybine" was defined by the court in this case as a machine designed, marketed, and used to mow, condition and windrow hay in a single step.

2. V.T.C.A., BUS. & C. § 9.401(a)(3) (1968) requires a security interest in goods of the type claimed by the appellant, "equipment used in a retail store operation," to be filed with the Secretary of State in order to be perfected. Since the court held that the haybine was equipment used in farming operations, the proper place to file would be the office of the register of mesne conveyances or the clerk of court in the county of the debtor's residence, under V.T.C.A., BUS. & C. § 9.401(a)(1). The filing requirements of the South Carolina Code are identical to those of the Texas Code; thus the result as to the place of filing would be the same in South Carolina as in Texas. *See* S.C. CODE ANN. § 10.9-401(1)(a)(c).

The central issue before the court was whether a haybine used by a non-farmer in a commercial hay cutting business was "farm equipment" within the exemption from filing provision of the Code,[3] or merely "equipment" and, therefore, subject to the filing requirements.[4] In deciding the question, the court failed to adopt an exact standard to be applied in determining the appropriate classification of different types of "goods". Such a standard is, however, made necessary by Section 9-109 of the Uniform Commercial Code, which lists four categories of "goods".[5]

The traditional standard determinative as to classification is the "use" or "primary use" test.[6] The basis for this test is simply the primary use made of the goods during any particular period of time. An early case in which the "use" test was applied was *In re Leiby*.[7] This case involved a determination of whether an excavating machine was "farm equipment" or merely "equipment" within the meaning of the Uniform Commercial Code. The court relied on the words, "used or bought for use", in the Code definition of "equipment" to ascertain the proper category for the machine in question.[8] Elucidating this test further, the court stated that the:

> use for which the equipment is actually purchased or the use actually made of the equipment is the criterion to be employed when determining what steps are neces-

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3. V.T.C.A., BUS. & C. § 9.302(a)(3) (1968) provides:
(a) A financing statement must be filed to perfect all security interests except the following:
. . . .
(3) a purchase money security interest in farm equipment having a purchase price not in excess of $2,500.

4. *Id.*

5. UNIFORM COMMERCIAL CODE § 9-109 defines "Goods" as "Consumer Goods," "Equipment," "Inventory," or "Farm Products." However, since a purchase money security interest in farm equipment having a purchase price less than $2,500 is perfected without filing, it is necessary to separate "equipment" into two categories: "mere equipment" which is used in the trade or business, and "farm equipment."

6. *See, e.g., In re Leiby,* 1 UCC REP. SER. 428 (E.D. Pa. 1962); *In re Anderson,* 6 UCC REP. SER. 1284 (S.D. Ohio 1969); *In re La Rose,* 7 UCC REP. SER. 964 (D. Conn. 1970); Funk, *Problems of Classification Under Article Nine of the Uniform Commercial Code,* 102 PA. L. REV. 703 (1954).

7. 1 UCC REP. SER. 428 (E.D. Pa. 1962).

8. UNIFORM COMMERCIAL CODE § 9-109(2) defines "goods" as "equipment if they are used or bought for use primarily in business (including farming or a profession) . . . or if the goods are not included in the definitions of inventory, farm products, or consumer goods." This provision is identical to § 9-109(2) of the Texas Business and Commerce Code, V.T.C.A., BUS. & C. Section 9.109(2) (1968).

sary by the secured party in order to perfect a security interest.[9]

In a recent Connecticut case, *In re La Rose*,[10] the court also applied a "primary use" test in differentiating between "equipment" and "farm equipment". The use of this test is apparently in accord with the intent of the drafters of the Uniform Commercial Code.[11]

The criterion of classification urged by the appellant in *Sperry-Rand* was a "primary capacity and use" test.[12] This standard is similar to the "primary use" method of classification but allows the court to consider the occupational status or "capacity" of the user-debtor as well as the use to which the goods are actually put. The appellant argued that the application of such a test would determine that a refrigerator is "inventory" in the hands of a dealer, "equipment" in the hands of a doctor, and "consumer goods" in the hands of a house-holder. Similarly, a tractor could be "inventory" in the hands of a dealer, "consumer goods" in the hands of a householder who uses it to keep his yard, "construction equipment" in the hands of a contractor, and "farm equipment" in the hands of a farmer.[13] The point being made by the appellant is that the "capacity" of the user at the time the "goods" are utilized is actually determinative of the category into which those "goods" should be placed. Although the court did not accept the bank's argument, it was found to be persuasive, and the court stated that it "might find its [the bank's] suggested method of classification to be valid under other circumstances."[14] However, no hint of those other circumstances can be found in the opinion.

The language used by the *Sperry-Rand* court in the concluding paragraph of its opinion is the familiar terminology most commonly associated with the "use" test.[15] In restating this test,

9. 1 UCC REP. SER. at 429.
10. 7 UCC REP. SER. 964 (D. Conn. 1970).
11. UNIFORM COMMERCIAL CODE § 9-109, Comment 2 states that "In borderline cases . . . the principal use to which the property is put should be considered as determinative."
12. 456 S.W.2d 273 (Tex. Civ. App. 1970). *See also Sequoia Machinery, Inc. v. Jarrett*, 410 F.2d 1116 (9th Cir. 1969), which involved the sale of a combine to a non-farmer who used the machine to harvest the crops of others. The court, refusing to consider the occupational status of the user, in effect renounced a "primary use and capacity" test. *In re Anderson*, 6 UCC REP. SER. 1284 (S.D. Ohio 1969) reached the same result on different facts.
13. 456 S.W.2d at 275.
14. *Id.*
15. *See* note 6 *supra*.

the court said that the haybine was "farm equipment," since Reynolds "bought it for and used it only for [the] purpose for which it was designed and marketed."[16] This assertion is, however, not convincing as a determinative standard when one considers that a haybine, or indeed any other type of highly specialized "goods", is susceptible of only one "use"—that for which it was designed and marketed.

The best explanation of the court's decision in the *Sperry-Rand* case is probably the policy consideration underlying the provision of Section 9-302 of the Uniform Commercial Code which exempts "farm equipment" from the filing requirement. The policy reasons for granting this exemption rest on the assumption that

> the practice of farmers and other consumers to buy items of equipment on conditional sales contracts is so common that the chances of misleading other creditors does not seem serious enough to impose the added cost of filing upon all such transactions.[17]

The effect of the *Sperry-Rand* decision on future litigation is uncertain. The most that can be said is that one court has considered the adoption of a "primary capacity and use" standard of classification, and has rejected it, but with the express stipulation that such a test might be considered under other circumstances. A "primary capacity and use" test would seem to be fundamentally more equitable than a mere "use" criterion, since the occupational status or "capacity" of the user is the real determinant of the exact use to which the goods are put.

The Review Committee for Article Nine has proposed that the exemption from filing provision for farm equipment under Section 9-302 be eliminated entirely.[18] This would seem to be the most expedient solution to the matter, since it would eliminate the borderline "equipment"—"farm equipment" controversy. The fact remains, however, that the "primary use" test continues to

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16. 456 S.W.2d at 275.
17. Bunn, *Financing Farmers: Existing Wisconsin Law, the Green Giant Case, and the Uniform Commercial Code*, 1954 WIS. L. REV. 357.
18. 7 UCC REP. SER. 6 (August 5, 1970).

be the standard for classification under the Uniform Commercial Code.[19]

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19. *See* the South Carolina Reporter's Comments to S.C. CODE ANN. § 10.9-109 (Supp. 1966), which provide in part: "[T]he crucial test as to which of the classes the goods would fall into would depend upon their primary use at any given point of time." The pertinent sections of the Texas Business and Commercial Code, notes 3 and 9 *supra*, are identical to those of the South Carolina Version of the UNIFORM COMMERCIAL CODE found in the S.C. CODE ANN. §§ 10.9-109 and 9-302(1)(c) (Supp. 1966).